Supreme Court U.S.
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No. 01-1110

In the
Supreme Court of the United States

BENNIE ROZMAN,
d/b/a LYNDE INVESTMENT COMPANY,
Petitioner,
SUSAN RODRIGUEZ, SHERRI BONIARCZYK,
Intervenor Plaintiff,
v.

CITY OF COLUMBIA HEIGHTS,
JOSEPH STURDEVANT, WALT FEHST, MEG JONES,
ROBERT W. RUETTIMANN, CHARLES KEWATT,
LOWELL G. DEMARS, MATT D. FIELD, GARY GORMAN, AND
ROLLIN GOLDSBERRY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. The Parties.

Petitioner/Plaintiff Bennie Rozman d/b/a Lynde Investment Company (Petitioner) owns and manages 12 residential rental apartment buildings in the City of Columbia Heights, Minnesota.

Respondent/Defendant City of Columbia Heights (City) is a municipality located in Anoka County, Minnesota. It has a population of approximately 18,000 people. The City has over 2,400 rental units, which is an unusually high proportion compared to other cities in Minnesota. The Respondents/Defendants individually named include: Joseph Sturdevant, the City's mayor; Meg Jones and Robert W. Ruettimann, members of the Columbia Heights City Council during 1996 and 1997; Walt Fehst, the City manager; Charles Kewatt, the City's fire chief; Lowell G. Demars, the assistant fire chief and housing enforcement officer; Matt D. Field and Gary Gorman, two firefighters/housing inspectors who were working under his direction; and Rollin Goldsberry, a police officer for the City. Demars died on March 13, 1997.

B. Columbia Heights Housing Code.

In 1994, the City amended its housing maintenance code (Code) Chapter 5A to provide for the annual inspection of rental dwellings. (Ord. No. 1281.) Under the Code, no person, firm or corporation can operate a rental dwelling without a license issued by the City. Sec. 5A.602. Rental licenses are effective for one year and rental dwellings are inspected, at a minimum, annually. Sec. 5A.407(1); 5A.401; 5A.404; 5A.303(2); 505A.403(1).

Section 5A.407(1) sets forth the requirements for license renewal, which include successful completion of the annual housing maintenance code inspection required by Section 5A.303(1). Under Section 5A.301(1), the City's inspectors "may enter for the purpose of inspection, any rental dwelling . . . upon twenty-four (24) hours' notice to the owner, occupant, manager or person in charge of the rental dwellings or premises." If the owner or occupant refuses to provide access and entry for inspection, pursuant to Section 5A.302(1) "the enforcement official may, upon a showing that probable cause exists for the inspection . . . petition and obtain an order to inspect and/or search warrant from a court of competent jurisdiction." The Code provides a process for license suspension or revocation and for its reinstatement. Sec. 5A.408(12). Pursuant to Section 5A.408(1), a license "may be revoked or suspended upon a finding of noncompliance with the provisions of this chapter."

The City has construed its ordinance as requiring that the landlords notify their tenants of the upcoming annual inspections. The landlord then must obtain consent from the tenants to conduct the inspections. If the tenant's consent is not obtained, the City then obtains an administrative search warrant and enters pursuant to that warrant.

C. 1996/1997 Inspection Dispute Which Is the Subject of This Appeal.

Petitioner's action against the City is premised on a dispute that arose beginning on May 31, 1996. On May 31, 1996, the City notified Petitioner of its intention to initiate the 1996 annual inspection of his rental properties. For each apartment building, the City sent Petitioner the following letter:

Dear Rental Property Owner/Manager:

In accordance with Columbia Heights City Ordinance #1281, the rental property identified above is due for an interior/exterior "Uniform Fire Code" and/or "Housing Maintenance Code" inspection. During this inspection, you will need to enter the tenant unit. Please notify your tenants of this impending inspection requirement.

Please contact this office at 782-2835 within 7 days to schedule an appointment.

Your prompt attention to this matter is greatly appreciated.

Petitioner refused to schedule the inspections with the City or otherwise notify his tenants of the City's need for inspection. Petitioner contended that it was the City's responsibility to provide each tenant with written notification. The City contended that it was the landlord's responsibility to arrange for the inspections and to provide his tenants with proper notification of the annual inspections. Petitioner has described the parties' dispute as follows:

Q: And did you, during 1996, notify the tenants that at a certain time the City would come over --

A: No.

Q: Isn't it true that that's what the City wanted you to do?

A: I've always stated that I would never do that because that's the City's job. I'm not a government agency.

(Rozman Depo., p. 53.)

By letter dated June 10, 1996, the City's acting city manager explained to Petitioner the reasons why the City holds the owner responsible for scheduling the inspections with his tenants. The letter explained:

> There are two major reasons why the City requires the owner to schedule the inspections. Most owners want to be present when the inspections are done, and if the City were to schedule with the individual tenants, the administrative costs would rise dramatically.

Petitioner steadfastly refused to schedule the inspections. The City notified Petitioner that a public hearing would be held to determine if Petitioner's rental licenses should be suspended or revoked for failure to allow inspection as required by the City's Code.

Although Petitioner was unwilling to notify his tenants of the City's need to inspect their apartments, Petitioner did send each tenant a letter urging attendance at the scheduled February 24, 1997 City Council meeting. At that Council meeting, the City Council discussed the issue of revocation and continued discussion on the issue until a March 4 workshop meeting. At that workshop meeting, Petitioner again had the opportunity to state his position to the City Council.

At the March 10, 1997 City Council meeting and after more discussion, the City Council voted to revoke Petitioner's rental licenses for each of his 12 buildings. Council members Jones, Ruettimann and Sturdevant voted affirmatively on each resolution. Council members Joly and Peterson voted against each resolution. The City Council's March 10, 1997 resolution approving the revocation states the following as its findings of fact:

1. That on NUMEROUS DATES DURING 1996, Lowell Demars, Enforcement Officer, for the City of Columbia Heights, mailed inspection request notices to [Petitioner] requesting that the building located thereon at . . ., within the City of Columbia Heights, Minnesota, and owned, according to the application for rental license on file for the above-described real property by [Petitioner], be scheduled for the annual licensing inspection.

2. That as of FEBRUARY 12, 1997 [Petitioner] has refused to schedule the required annual inspection of the rental units.

3. Based upon said information presented by the Enforcement Officer, the following conditions and violations of the City's Housing Maintenance Code and Licensing Rental Units were found to exist, to-wit:

a. FAILURE TO ALLOW *ANNUAL INSPECTION OF* ALL RENTAL UNITS LOCATED AT . . .

On March 14, 1997, Petitioner brought this lawsuit.

Contrary to Petitioner's statement to this Court, at no time in 1996-1997 did the City inspectors appear at Petitioner's apartment buildings and demand that Petitioner open tenants' apartments without the tenants' consent or a search warrant. There is no basis in the record for Petitioner's assertion to this Court. On March 20, 1997, City firefighters/inspectors entered several of Petitioner's apartment buildings. The inspectors knocked on several tenants' doors and requested permission of the tenants to conduct the housing maintenance inspections at a later time. Some tenants scheduled the inspections for a future date. Other tenants told the inspectors that they could come in at that time and conduct the inspection. On the following day, Petitioner filed his amended complaint. Eventually the buildings were inspected, and Petitioner's rental licenses were reinstated by the City Council.

Petitioner later challenged in state court the City's procedure for its obtaining of search warrants for the inspection of the rental dwellings. The Minnesota Court of Appeals upheld the City's warrant procedure, and the Minnesota Supreme Court denied review. Search Warrant of Columbia Heights v. Rozman, 586 N.W.2d 273 (Minn. Ct. App. 1998), rev. denied.

D. Petitioner's Lawsuit.

Petitioner claimed in Count 1 of his complaint that the City deprived him of his property interest in his rental licenses without due process of law in violation of 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments. The district court determined that the City did not act arbitrarily or capriciously when it revoked Petitioner's licenses because he refused to notify his tenants of an upcoming inspection. (Petitioner's Appendix [P] 26a-27a.) The district court explained:

> Plaintiff attempts to persuade the Court that defendants were "out to get him" by citing statements allegedly made by various individual defendants. These statements, even in the light most favorable to plaintiff's position, do not establish any animus on the part of defendants. In any event, even if plaintiff could establish animus, the City Council had ample authority within the City's building Code to revoke plaintiff's rental licenses. . . . Plaintiff admits that it refused to provide notice to its tenants of upcoming maintenance inspections, as the Code requires. Plaintiff's failure to comply with the Code's requirements justified the revocation of its licenses, and the City's actions in revoking the licenses were not arbitrary and capricious.

(P. 27a-28a.)

In Count 2, Petitioner claimed that the City violated his Fourth Amendment rights when it entered the tenants' apartments without their permission. (P. 28a.) The district

court dismissed this claim concluding that Petitioner lacked standing to assert his tenants' rights.

In Count 3, Petitioner claimed that the City violated the equal protection clause of the Fourteenth Amendment and violated 42 U.S.C. § 1985(3) when it revoked his rental licenses without cause. The district court determined that Petitioner's equal protection claim failed because he did not establish facts sufficient for a disparate treatment claim. (P. 28a-29a.)

In Counts 4 through 8, Petitioner asserted state law claims. The district court declined to exercise supplemental jurisdiction over these claims. (P. 33a-33b.)

Under Count 9, Petitioner argued that three sections of the City's Code were unconstitutional, both facially and as applied. The district court interpreted the City Code to be constitutional and determined that Petitioner had no standing to challenge the other Code sections. (P. 29a-33a.)

Petitioner then appealed to the United States Court of Appeals for the Eighth Circuit primarily challenging the grant of summary judgment to Respondents on his purported substantive due process claim and the district court's refusal to exercise supplemental jurisdiction over the state law claims. In affirming the district court's grant of summary judgment, the Eighth Circuit stated:

> The City terminated Rozman's rental licenses for his "failure to allow inspection of the rental units." The City may constitutionally require the landlord to notify tenants of the City inspection. Such a requirement is not so fundamentally unfair that it rises to the level

> of a substantive due process violation. . . . Furthermore, providing notice to a tenant does not violate either the landlord's or the tenant's constitutional rights.

(P. 19a.)

The United States Court of Appeals then granted an *en banc* hearing which was held on July 10, 2001. In a "*per curiam*" opinion, the Eighth Circuit affirmed the district court. (P. 1a.) The Eighth Circuit explained:

> Regardless of the conflicting factual claim surrounding the events preceding the revocation of the licenses, there is no dispute that Rozman refused to schedule the inspections. As we said in the panel opinion, the City may constitutionally require the landlord to notify tenants of the City inspection. Rozman, 220 F.3d at 868. Because this requirement is not an irrational act, we determine the requirement does not violate substantive due process.

(P. 6a; internal citations omitted.)

REASONS WHY PETITION SHOULD BE DENIED

THE LOWER COURTS' DISMISSAL OF PETITIONER'S ACTION IS IN ACCORD WITH THIS COURT'S DECISIONS AND THE UNDISPUTED MATERIAL FACTS OF RECORD.

This Court has emphasized the necessity of great judicial restraint in the application and interpretation of substantive due process. A substantive due process

violation takes place only when governmental power is exercised arbitrarily and oppressively. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998), citing Daniels v. Williams, 474 U.S. 327, 331 (1986). In order to violate the due process clause, governmental action must be "arbitrary in the constitutional sense." Collins v. City of Harker Heights, Tex., 503 U.S. 115, 129 (1992). "[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." County of Sacramento, 523 U.S. at 846.

The Petitioner seeks a grant of certiorari based solely on his contention that the lower courts failed to correctly apply the well-established standards governing summary judgment to the facts of this case. Therefore, according to Petitioner, he was improperly denied his right to proceed to trial on his substantive due process claim against the City. The lower courts' opinions are not in any respect in conflict with this Court's precedent and certainly this case does not call for this Court's supervisory authority. Rather, it is Petitioner who has failed to accept the "facts" which the record undisputedly reflects and which the lower courts properly applied in granting Respondents summary judgment.

Petitioner takes issue with the fact that Petitioner's rental licenses were revoked in 1997 for failure to notify the tenants of the City's scheduled 1996 inspections. As the district court and the Eighth Circuit Court of Appeals' review of the record concluded, the record stands undisputed that the triggering event for the parties' dispute, which eventually would lead to the 1997 license revocation, was Petitioner's refusal to notify his tenants of the upcoming 1996 annual inspections. The City's position has always been set forth clearly and unequivocally. Contrary to Petitioner's statement to this Court, the City inspectors

never went to Petitioner's buildings and demanded that Petitioner open up the tenants' units for inspection without the tenants' consent or without a warrant. There is no record support for Petitioner's assertion to the contrary. The controversy, instead, always centered on whose obligation it was to schedule the inspections with the tenants. Petitioner has admitted that he refused to provide notice to his tenants of the upcoming inspections. (P. 27a-28a.)

In making his assertion of a material issue of fact, Petitioner asks the Court to ignore the City Council's resolution approving Petitioner's license revocation. The resolution of the City Council approving revocation specifically states it is based on Petitioner's refusal to schedule the required annual inspections of the rental units.

Finally, Petitioner loses sight of what proving a violation of substantive due process requires. Petitioner has never asserted that the City Code, on its face, mandated the landlord open the tenants' doors to the City inspectors without the tenants' consent. The record stands undisputed that the City has always interpreted its Code as requiring that the landlords notify their tenants of the upcoming annual inspections. If the argument being made by Petitioner is that the City Code was improperly interpreted by the City and that the Code does not require that landlords notify their tenants of an upcoming annual inspection, that is a state law claim, not a substantive due process claim. All that leads to is a claim that the City has not properly interpreted its Code. A misinterpretation of City Code is not a governmental action that gives rise to a federal substantive due process claim.

Similarly, Petitioner's argument that the reason stated for revocation in the March 10, 1997 resolution

revoking Petitioner's licenses was not the true reason for the license revocation, would also present an issue of state law, not a substantive due process issue. Such a claim could properly have been tested in state court, which Petitioner did not do.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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